No. 83-1678

SUPREME COURT OF THE UNITED STATES

October, 1983 Term

RICHARD F. CELESTE, GOVERNOR OF OHIO,
Appellant,

v.

JUANITA C. BRANDON, et al.,
Appellees.

On Appeal From The United
States District Court For
The Southern District Of Ohio

JURISDICTIONAL STATEMENT OF APPELLANT, RICHARD F. CELESTE, GOVERNOR OF OHIO

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QUESTIONS PRESENTED

A. Did the trial court err in its interpretation of the "good-faith effort" standard which has been developed for Congressional redistricting under Article I, § 2 of the United States Constitution?

B. Did the trial court err in finding that uncorroborated opinion evidence as to the theoretical possibility for further reductions in the population variances of Ohio's Congressional redistricting plan, enacted as Ohio Rev. Code, § 3521.01, is relevant to and, indeed, dispositive of the good-faith-effort issue?

C. Did the trial court err in finding that Article I, § 2 requires the use of census blocks in Congressional redistricting?

D. Did the trial court err in its interpretation and application of the "justification" standard for population variances which has been developed for Congressional redistricting under Article I, § 2 of the United States Constitution?

LIST OF PARTIES

A. Parties opposing the Ohio Plan:

Juanita C. Brandon
Rose Marie Higenbottam
Gary W. Starr
Raymond J. Wohl
Frank D. Castelli
Richard R. Mackay
James J. Modarelli
Beryl E. Rothschild
Jeffrey H. Freidman
M. David Fredman
Leonard Davis
Alan Rutsky
Leonard Vannice
Richard Damiani
Thomas Longo
Robert Paulson
Daniel Pocek

B. Parties defending the Ohio Plan:

Richard F. Celeste, Democratic Governor of Ohio
Sherrod Brown, Democratic Secretary of State of Ohio
Patrick A. Flanagan, Republican State Central And Executive Committeeman, and Chairman of the Montgomery County Republican Party
Ann Butler, Republican State Central and Executive Committeewoman

Parties residing in the 21st Congressional District (incumbent: Louis Stokes):

Judy Botwin
Barbara H. Boyd
Austin R. Cooper
Russell G. Fox
Cheryle Goode
Joyce Grimes
Terry Meister
Thaddeus Jackson
Eugene Pearson
Shirley Wilson
Steve Wortheim
Dorothy Spiker

Parties residing in the 20th Congressional District (incumbent: Mary Rose Oakar):

Robert J. Babcock
Susan Birmingham Brooks
David L. Dian
Kenneth Loeri
Robert Rodriguez
Karl Toth
Rual Vega

Parties residing in the 19th Congressional District (incumbent: Edward F. Feighan):

Carol M. Finnan
John Holleran
Mary Ann Sikorsky
Nancy Toth

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPORTED DECISIONS BELOW

In adjudicating this case, the three-judge panel below delivered two opinions. The first, captioned as *Flanagan* v. *Gillmor*, was decided May 25, 1982 and is reported at 561 F.Supp. 36. The second Opinion is unreported. It was rendered January 30, 1984 (Appendix A). It was corrected on February 9, 1984 (Appendix B) and modified on February 13, 1984 (Appendix C). The appellant filed a notice of appeal from the latter decision, as corrected and modified, and moved for a stay on February 13, 1984 (Appendix D). On February 17, 1984, the panel granted a stay of its orders of January 30,

1984, as clarified on February 13, 1984, pending appeal to this Court (Appendix E).

JURISDICTIONAL GROUNDS

This appeal is taken from the January 30, 1984 Order (as corrected in a February 9, 1984 Order and modified in a February 13, 1984 Order) of a three-judge panel appointed pursuant to 28 U.S.C. § 2284(a), declaring Ohio's enacted Congressional districting plan — Ohio Rev. Code § 3521.01 — to be violative of Article I, § 2 of the United States Constitution and enjoining the conduct of the 1984 elections under that plan.

The three-judge panel was appointed on March 15, 1982, after Patrick A. Flanagan and Ann Butler on February 16, 1982 filed, in the United States District Court for the Southern District of Ohio, a class action complaint alleging that the Ohio General Assembly had failed to enact a Congressional districting plan and requesting the Court to establish one, *Flanagan* v. *Gillmor*, No. C-2-82-173. On March 24, 1982, the General Assembly enacted the present Congressional districting plan, which was signed into law by then Governor James A. Rhodes on March 25, 1982.

However, on March 26, 1982, Juanita C. Brandon and Rose Marie Higenbottam moved to intervene in the case and were granted intervention on April 6, 1982. Their Complaint in Intervention was styled as a class action and alleged, *inter alia*, that the enacted Congressional districting plan violated the "one person, one vote" requirement of Article I, § 2. Subsequently, the panel granted intervention as defendants to certain Cuyahoga County residents[1] and certified the case as a class action.

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[1] Twelve residents of the 21st District, served by Representative Louis Stokes, seven residents of the 20th District, served by Representative Mary Rose Oakar, and four residents of the 19th District, served by Representative Edward F. Feighan, were granted intervention to defend the plan.

Also, on March 26, 1982, Gary W. Starr, Raymond J. Wohl, Frank D. Castelli, and John Kavlich filed a Complaint in the United States District Court for the Northern District of Ohio alleging, *inter alia*, that the plan violated the one-person-one-vote mandate. Later, an Amended Complaint was filed and a number of electors from the newly created 21st Congressional District moved to intervene as defendants in the Northern District action. On April 13, 1982, a three-judge panel in the Northern District granted the Motion to Intervene as defendants and transferred the Northern District action to the three-judge panel in the Southern District for consolidation with the action pending there. That case, *Starr* v. *Rhodes*, No. C-2-82-394 was consolidated with *Flanagan* v. *Gillmor*. Trial began on April 19, 1982 and concluded on April 21, 1982.

A third case, *Paulson* v. *Rhodes*, C-2-82-441, was filed in the Northern District on April 21, 1982. Is was transferred to the Southern District and, on June 7, 1982, consolidated with the consolidated cases of *Flanagan* v. *Gillmor* and *Starr* v. *Rhodes*.[2]

In an Order and Opinion filed May 25, 1982, and reported at 561 F.Supp. 36, the Southern District panel disposed of certain gerrymandering claims of the challengers to the Ohio districting plan, but held in abeyance the issue of whether or not the plan satisfied the one-person-one-vote requirement. The panel awaited the decision of *Karcher* v. *Daggett*, — U.S. —, 77 L.Ed2d 133, 103 S.Ct. 2653, which was handed down on June 22, 1983.

On January 30, 1984, the three-judge panel filed an Opinion and Order relative to the remaining one-person-one-vote issue. That Opinion held that Ohio Rev. Code, § 3521.01 contravened the one-person-one-vote stricture of Article I,

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[2] By stipulation, the Plaintiffs in *Paulson* agreed to be bound by trial record and the Southern District Court's resolution of the consolidated *Flanagan* and *Starr* cases.

§ 2. It directed the Governor of Ohio and Ohio Secretary of State – the State's chief elections officer – to "present the matter" to the Ohio General Assembly.[3] The Order required that "a revised plan should be forwarded" to the panel within forty-five days, but was silent as to whether elections under the present Congressional districting plan were enjoined.

The matter was duly presented to the Ohio General Assembly and, on February 8, 1984, this Defendant-Appellant filed a Motion for a Reconsideration, Clarification, and Stay of the January 30 Order and Opinion. Clarification was sought from the panel as to whether or not the 1984 elections under the present districting plan were enjoined. On February 10, 1984, the panel convened to hear argument on this Motion and on a number of motions filed by other parties. From the bench, the Court denied the Motion for Reconsideration and Clarification. On February 13, 1984, the Court filed a written Order denying the Motion for Reconsideration, but granting the Motion for Clarification and modifying the January 30 Order to specify that the 1984 elections under the plan were enjoined. Also, Defendant-Appellant's Motion for a Stay was denied without prejudice as being not ripe.

Also, on February 13, 1984, this Defendant-appellant filed a Notice of Appeal, along with a Motion for a Stay of the January 30, 1984 Order (Appendix D). The panel granted a stay on February 17, 1984 (Appendix E).

Jurisdiction over this appeal of the January 30 Order (as corrected by the February 9 Order and modified by the

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[3] Both the original complaint and the intervenors' complaint in *Flanagan* named as additional defendants Paul E. Gillmor, President of the Ohio Senate, Harry Meshel, Senate Minority Leader, Vern Riffe, Speaker of the Ohio House of Representatives, and Corwin M. Nixon, House Minority Leader. Pursuant to a stipulation of dismissal filed on April 19, 1982, Gillmor, Meshel, Riffe, and Nixon were dismissed as defendants, leaving the Governor and Secretary of State as the only office-holding defendants.

February 13 Order) is conferred upon this Court pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Article I, § 2 United States Constitution provides in relevant part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . . Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . .

B. 28 U.S.C. § 2284 provides in relevant part:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

C. 28 U.S.C. § 1253:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judg

D. Ohio Rev. Code, § 3521.01: (Appendix F)

STATEMENT OF THE CASE

On behalf of the State of Ohio, Appellant Celeste, Governor, maintains that the three-judge panel below erred in several respects when it invalidated on equal-population grounds Ohio's present Congressional districting plan. It erred in interpreting the "good-faith effort" standard which has been developed for Congressional redistricting. It erred in finding that uncorroborated opinion evidence as to the theoretical possibility for further reductions in the Ohio plan's population variances was relevant to and, indeed, dispositive of the good-faith-effort issue. It erred by holding, in effect, that the United States Constitution mandates the use of the census block — the smallest unit of census measurement, next to an individual person — in Congressional redistricting. And, it erred in its interpretation and application of the "justification" standard for population variances which has been developed for Congressional redistricting.

Appellant believes this error resulted largely from the panel's failure to recognize the significant factual differences between the instant case and the Congressional redistricting decisions of this Court. Essentially, the key differences are, first, that absolutely no *de minimis* standard of population variance was used in devising the Ohio plan. Second, no secondary interest of the State was placed above the primary goal of attaining precise population equality among the districts. Third, the plan was the product of a bipartisan effort and used the freshest available census data. Lastly, any significant variances in the plan were justified (if justification were needed) by the presence of some legitimate State interest.

The Ohio plan has an average percentage deviation of but .14% (or 720 persons),[4] which attests to the primary importance

[4] Or about 94 voters in a Congressional primary election, 216 voters in a Congressional general election. The former figure is based on the voter turn-out in Ohio's 1982 Congressional primary elections (1,403,000), expressed as a percentage of the total State population

accorded to achieving equal population among districts in the Ohio plan. The facts of this case, along with the error committed by the three-judge panel, are set forth in detail below.

As a result of the 1980 census, the number of Congressional seats to which Ohio is entitled declined from 23 to 21. Consequently, Congressional redistricting was required for the State.

The Ohio General Assembly undertakes Congressional redistricting in the same way that it undertakes the enactment of other legislative measures. Redistricting bills are introduced into one or both houses of the Assembly, then assigned to a standing committee of the respective house.

The Ohio legislature is no different from any other in that most of its work is accomplished through its standing committees. The legislature is akin to a benign Hydra: its several "heads" are its committees, each of which operates on behalf of the organism as a whole.

Similarly, when a bill goes to a conference committee, the committee operates on behalf of the legislature as a whole. When a bill which has passed one house is amended in the other house, the first body must vote to concur in the amendments. If it votes not to concur in the amendments and the other body votes to "insist" on its amendments, a conference committee is required. The committee, three of whose members are appointed by the President of the Senate and three by the Speaker of the House, attempts to resolve the differences between the two houses and to draft a bill which will be acceptable to both.

To the 114th General Assembly fell the task of eliminating two Congressional seats and redrawing district boundaries.

(13%), and multiplied by 720 persons. The latter figure is based on the voter turn-out in the 1982 Congressional general elections (3,326,098), expressed as a percentage of the total State population (30.8%), and multiplied by 720 persons.

Republicans controlled the Senate during this session of the legislature, and Democrats controlled the House. The Governor of Ohio at that time was James A. Rhodes, a Republican, who had to sign the enacted legislation.

Ohio's redistricting effort began on January 8, 1981, when a redistricting plan known as House Bill 20 was introduced in the Ohio House of Representatives. The sponsor of the Bill was Representative Terry Tranter, a Democrat.

For a variety of reasons, no immediate action was taken on the Bill. One important reason was that Ohio, an industrial state suffering severely from the effects of a national recession, faced fiscal collapse. Ever-changing shortfalls in State revenue were addressed by a succession of State budgets, occupying the lion's share of legislative time through November of 1981. Moreover, the 1980 census data for Ohio were not immediately available. (As introduced, House Bill 20 was based on the 1970 census results.)

On January 19, 1982, after receipt of the 1980 census data and after the House had returned from a short year-end recess, the House Elections Committee substantially amended House Bill 20 and voted to report it back to the House with a favorable recommendation for passage. Subsequently, on January 27, 1982, the House Rules Committee further amended the Bill and placed it on the Calendar for a vote the same day. After further amendment on the floor, the Bill passed the Democratic-controlled House by a party-line vote.

The Republican-controlled Senate promptly took up the legislation; and the Bill was substantially amended in the Senate Elections Committee, which reported it back to the full Senate with a favorable recommendation for passage. By a party-line vote, the full Senate passed an amended Bill on February 17, 1982. The House declined to concur in these Senate amendments, and a conference committee was requested on February 24, 1982.

Owing to the "split" in political control of the two legislative houses, the Conference Committee was bipartisan in composition, having three Democratic and three Republican members. The Democratic members worked under the guidance of the Speaker of the House, Vernal G. Riffe, Jr.; the Republican members under the guidance of the then President of the Senate, Paul Gillmor. Although other individuals were involved, Speaker Riffe and President Gillmor led the development of the final districting plan.

No sooner was the Conference Committee appointed than it found itself under time pressure. The pressure arose from a class action suit in the United States District Court for the Southern District of Ohio, brought by Patrick A. Flanagan and Ann Butler alleging that the legislature had failed to enact a redistricting plan and requesting the Court to establish the Congressional districts. Also, the pressure arose from the rapidly-approaching March 24, 1982 deadline for the filing of candidacy petitions for Congress.

Rather than succumb to partisan squabbling and reach the partisan deadlock which often has afflicted other states, the Conference Committee responded to the situational pressures with efficiency and speed. The Committee (necessarily with bipartisan support) reported a redistricting bill back to the two chambers of the legislature; and, on March 24, 1982, each chamber, also with strong bipartisan support, voted to approve the Conference Committee report. Then Governor James A. Rhodes signed the Bill into law on March 25, 1982 — only one day after the Congressional filing deadline, but the enactment contained a provision postponing the petition filing deadline to April 5, 1982. Because of certain, limited errors in House Bill 20, a corrective measure, House Bill 953, was enacted and became effective on April 5, 1982.

Operating efficiently, the two legislative leaders and the Conference Committee utilized a division of labor and expertise in order to complete the redistricting assignment. Throughout the process, however, it was understood by every-

one involved that the primary goal was to achieve population equality among the Congressional districts. Absolutely no *de minimis* level of population variance was established, either explicitly by instruction or implicitly by action. Indeed, as the plan approached completion, continual adjustments were made to eliminate or reduce the population variances.

Nor were proposed amendments received from other legislators not directly involved in the process that, if adopted, would have significantly reduced or eliminated the population variances in the ultimately enacted Bill. While, earlier, the then Senate Minority Leader Harry Meshel did promote an amendment to House Bill 20 in the Ohio Senate, that amendment (which was defeated by a party-line vote on the floor of the Senate), when compared with the other forms of House Bill 20 which the legislature had before it, did not significantly reduce or eliminate the population variances. Having no alternative proposals to reduce significantly or eliminate population variances before it – either in the Senate, House, or Conference Committee – the legislature obviously rejected none.

Quoting from its earlier decision at 561 F.Supp. at 42, the Court below concluded in its January 30, 1984 decision that the enacted plan "compares favorably" to the other proposals which the legislature had before it. The Court found the "ideal," per-district population to be 514,173. The plan was found to have an average percentage deviation from the ideal of .14% (or 720 persons) and a total percentage deviation from the ideal of .62% (or 3,161 persons).[8] Although

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[8] The average percentage deviation was calculated by finding the sum of the percentage deviations in each of the Congressional districts, and then dividing that sum by the total number of districts. The total percentage deviation was calculated by determining the range of deviation between the district with the highest population and the district with the lowest population. As was demonstrated earlier, at note 4, the number of actual *voters* represented by the average percentage deviation is about 94 in a Congressional primary election and 216 in a Congressional general election.

two plans before the legislature had average percentage deviations of .11% – three-hundredths of one percent lower than the enacted plan – none had a lower total percentage deviation.

While a variety of legitimate state interests were considered in shaping the Congressional districts, at all times these objectives remained secondary. None was elevated in importance over achieving population equality among the districts.

With the political control of the legislature vested in different parties, the final redistricting plan perforce was a "political compromise" in the highest and best sense of that term. The Conference Committee used fresh census data in calculating the district populations, and the interests of both political parties (and their varied constituencies, including incumbent members of Congress) were represented.

In the process of developing the final plan enacted as Ohio Rev. Code, § 3521.01 (Appendix F), the two legislative leaders, the Committee members, and the others involved sought to promote certain State interests which, while legitimate, also were clearly secondary in importance to the principal goal of attaining population equality. Among these interests were achieving political fairness in the redistricting plan; preserving the cores of prior districts (including the constituencies of Representative Louis Stokes, Ohio's only black member of Congress, and Representative Mary Rose Oakar, then its only woman in the Congress); avoiding contests between incumbent Representatives; and preserving communities of interest.

In order to promote the latter, an effort was made not to split census tracts. Only in a very few, isolated instances does the present redistricting plan divide a census tract into smaller census units and use those units to compute population.

Additionally, the enacted redistricting plan used census tracts because of the Conference Committee's desire to avoid the kinds of errors which the use of census blocks had occasioned in the House-passed version of House Bill 20. The extensive use of census blocks – the smallest units of measurement, next to individual persons – in the House-passed version resulted in page upon page of computational errors and omissions of persons from districts.

In contrast, the enacted plan predominantly used census tracts and enumeration districts, which generally are larger units of measurement than census blocks. Only minor errors occurred in the plan, which later were corrected.

Furthermore, only certain metropolitan areas of Ohio were divided into census blocks for purposes of the 1980 census. Thus, in the rest of the State, census blocks were not available to the Conference Committee. However, census tracts and enumeration districts were available for the entire State.

The questions sought to be reviewed herein were raised by this Appellant in a brief filed with the trial court on behalf of himself and Ohio Secretary of State Sherrod Brown (Ohio's chief elections official) as the defendants representing the State of Ohio. As explained earlier in the statement of Jurisdictional Grounds, the three-judge panel to which this case was tried initially on May 25, 1982, disposed of certain claims of the challengers, but held in abeyance the question of whether or not Ohio Rev. Code, § 3521.01 satisfied the one-person-one-vote stricture. *See Flanagan* v. *Gillmor*, 561 F.Supp. 36 (S.D. Ohio 1982). The panel deferred a resolution of the question until this Court had rendered its decision in *Karcher* v. *Daggett*, — U.S. —, 77 L.Ed.2d 133, 103 S.Ct. 2653 (1983). After the *Karcher* decision was handed down, the panel ordered the parties to brief the one-person-one-vote issue.

On September 19, 1983, this Appellant and Appellant Secretary of State Sherrod Brown filed on behalf of the State

of Ohio a joint brief in support of Ohio's Congressional districting plan. That brief stated that, under the totality of the circumstances and based on the evidence of record as a whole, the challengers to the Ohio plan had failed to carry their burden of proving that the State had not made a good-faith effort to construct districts of equal population.

Also, the brief pointed out that the instant action differed significantly from *Karcher* and its ancestor cases. First, the record showed that no *de minimis* level of variance was established by the Ohio legislature. To the contrary, evidence of record was cited showing that serious and continual attempts were made to reduce or eliminate the population variances in the plan up to the moment of its adoption by the Conference Committee.

Second, at no time did the legislative principals involved in crafting the Ohio plan – or the legislature itself – place any secondary goal above the main aim of achieving exact population equality among the districts. Cited in support was the copious testimony of Senate President Gillmor, House Speaker Riffe, and others involved and the fact that the legislature never had before it, much less rejected, any alternative redistricting plan or amendment to a plan which would have significantly reduced the population variances below those ultimately existing in the enacted plan.

Third, the Ohio plan was the product of a bipartisan effort. However, as the cited evidence showed, the necessity of attaining bipartisan support for the plan in a legislature with split political control remained a secondary objective; achieving population equality was the overriding goal.

Additionally, it was argued in the brief that any population variances in the Ohio plan were fully justified by the State's legitimate interests in achieving political fairness, preserving the constituencies of Ohio's only black member and its then only woman member of Congress, and preserving communities of interest.

Subsequently, in a joint reply brief, this Appellant and Appellant Secretary of State Sherrod Brown argued that the mere possibility for improvement in the Ohio plan could not suffice to negate the evidence of legislative good faith. Also, it was submitted that *Karcher* highlighted a deference towards state justifications for population variances which was not so obviously present in earlier decisions of this Court and that the requirement of a consistent application of legitimate state interests necessitated that the State of Ohio show, not the consistent presence of a *single* legitimate interest behind every district variance, but the presence of *some* legitimate interest behind every significant district population variance.

Nevertheless, applying the two-tiered test developed in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and refined in *Kirkpatrick's* progeny – including *Karcher* – the panel ruled that the Ohio plan did not meet the equal population requirements of Article I, § 2 of the United States Constitution. Initially, the panel considered whether or not the opponents to the plan had met their burden of proving that it was not the product of a "good-faith effort" to achieve equal population among Congressional districts. Finding they had, the panel next determined whether or not the State had adequately justified the plan's population variances. The State, it decided, had not.

One subject of this appeal is the panel's interpretation of the "good-faith effort" tier of the equal population inquiry. According to the panel, a challenger to a Congressional districting plan wins on the good-faith-effort issue so long as the challenger can produce evidence that there was some way in which any of the variances might have been reduced – ". . . when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in the special sense in which *Karcher* and *Kirkpatrick* use that phrase." Appendix A, page 14a. Elsewhere, the panel candidly admitted that its interpretation of the good-faith requirement probably renders meaningless the term "good faith." Appendix A, page 14a, n.6.

The error in all panel's interpretation is that it effectively ignores all evidence of what a legislature actually did to reduce or eliminate population variances and focuses solely on the evidence of what a legislature hypothetically *might* have done *further* to reduce or eliminate population variances. Thus, according to that interpretation, unless a districting plan contains *no* variances, there always will be something that *might* have been done *further* to reduce or eliminate a plan's variances.

The panel's interpretation renders meaningless the requirement – clearly set forth in *Karcher* – that the challenger to a plan bear the burden of proof on the good-faith-effort inquiry. It effectively shifts to a state the burden of proving that there actually was no way in which a plan's variances could have been reduced further.

Moreover, even if the panel's interpretation of the good-faith effort standard is correct, the evidence of record clearly does not support the finding that the opponents to the Ohio plan carried their burden of proof on this issue. The "evidence" consists either of the opinions of the disgruntled or the solicited speculations of witnesses who could not deny under oath that the variances remaining in the plan *might* have been reduced. Indeed, the panel itself joined the theorizing and apparently took judicial notice of the "fact" that, if only Ohio had used units of census measurement smaller than census tracts, it *absolutely* would have achieved *significant* reductions in the population variances. However, the panel made no mention of specific examples.

Neither did the panel address another point raised in the joint brief in support of the Ohio plan: Such reasoning constitutionalizes the census block as the unit of population measurement required to be used in Congressional redistricting. As was stated in the brief, there are many problems with elevating the census block to constitutional status – not the least of which is that the State of Ohio (and several

other states) is not uniformly divided into census blocks. The State's metropolitan areas are divided into blocks, but its non-metropolitan areas are divided into census tracts and enumeration districts, units of measurement which generally are larger that census blocks.

Another subject of this appeal is the trial court's interpretation and application of the "justification" prong of the equal-population standard. Appellant believes that the State of Ohio had to justify the "significant" variances, not every variance. Yet, the panel stated, Appendix A, page 18a, "Given the arguable uncertainty surrounding the meaning of the term 'significant variance,' . . . the state would be well-advised to be prepared to set forth a basis for each variance." The panel made no attempt to identify which variations from the ideal were "significant." Nor did it discuss the evidence of record which tended to show the overall justifications for the variances. Appellant believes this was error.

Furthermore, the panel erred when it required that the *same* legitimate state interest be the cause of *every* variance before it can serve to justify a *single* variance. If this is the sort of "consistency" mandated by *Karcher* and its predecessors, then no state legislature ever can satisfy the consistency dictate. By nature, legislatures engage in a balancing of divergent and often competing interests in various geographical sectors when they enact a redistricting plan.

The record clearly supports the conclusion that the State of Ohio met its burden of justifying – if justification were needed – each significant population variance in the plan. Its secondary goals in the redistricting process were legitimate ones, and there was *some* legitimate state interest behind each variance – whether "significant" or not – although not always the *same* legitimate interest.

THE QUESTIONS PRESENTED REQUIRE THE PLENARY CONSIDERATION OF THE COURT WITH BRIEFS AND ORAL ARGUMENT

Precisely because the United States Constitution does not mandate *absolute* population equivalence among Congressional districts, this Court has devised a "good-faith effort" standard. *Cf., Karcher* v. *Daggett*, — U.S. —, 77 L.Ed.2d at 140 ("Precise mathematical equality . . . may be impossible to achieve in an imperfect world; therefore, the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality 'as nearly as is practicable.'"). Population variances which are the result of a good-faith effort to draw districts of equal population are permitted under Article I, § 2. Only if the variances are not the result of a good-faith effort does a state have to "justify" the variance under a standard which involves court inquiry into the legitimacy of the state's interests, the relationship between the variances and the state's interests, and other matters.

The federal courts long have recognized that redistricting is a task for which legislatures are best suited. Put simply, the good-faith-effort standard recognizes that state legislatures engage in a balancing of interests and allows them to undertake their acknowledged role in redistricting.

However, the interpretation and application of the good-faith-effort standard in the manner prescribed by the Court below cannot be reconciled with the purpose of that standard. According to that Court, for example, the fact the Ohio General Assembly engaged in a balancing of interests, as it is allowed to do, is evidence it did not make a good-faith effort to attain equality! (Appendix A, page 15a. "[T]he difficulty arose in this case, as in many others, when the legislature tried to achieve population equality while concurrently pursuing secondary goals. Pursuit of secondary goals will often result in variances where such variances might otherwise not exist." *See also*, pp. 14a-15a, and 24a.)

The lower Court said it simply was following *Kirkpatrick* and its progeny, and stated that the good-faith-effort standard established by those cases is "harsh for those attempting to draft constitutionally sound redistricting plans." (Appendix A, page 11a.) However, it proceeded to define and apply a good-faith effort standard that was not simply "harsh" but *impossible* for a state to satisfy unless each district is perfectly equal in population – in which case, there would be no point in having a good-faith *effort* standard. The panel below stated that it probably had transformed the words "good-faith effort," which appear repeatedly in *Karcher* v. *Daggett* and other Congressional redistricting decisions of this Court, into "surplusage." (Appendix A, page 14a, n.6.)

If the panel's application and interpretation of the good-faith effort standard are correct, it renders virtually nugatory the well-established principles that (1) Article I, § 2 of the United States Constitution does not mandate *absolute* population equivalence among Congressional districts, but a good-faith *effort* to achieve the same, and (2) redistricting properly is the domain of the legislative branch, not the judicial. The panel did recognize the magnitude of the problem when, in granting a stay of its January 30, 1984 Order (as corrected on February 9 and modified on February 13, 1984), is concluded (Appendix E, page 41a):

> This case presents serious and difficult legal questions. . .
>
> It is well established that courts may stay their own orders when they have ruled on admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained.

The latter reference of the Court below goes to the heart of the problem. The panel took from *Karcher* and its forerunners what it perceived to be the legal principles and standards involved in those cases and attempted to apply them to the facts of the instant action, which are completely different

from the facts of the other decisions. Here, unlike in those decisions, the equities strongly favor the state.

The factual differences already have been set forth. To recapitulate them, first there was no *de minimis* level of population variance established by the Ohio General Assembly. Second, the legislature placed no secondary interest above its primary goal of attaining precise population equality among Congressional districts. Evidencing this, for example, is the fact the legislature neither considered nor rejected any alternative plans or amendments to the enacted plan that would have reduced significantly the population variances found in the final plan. Third, the Ohio plan was the product of a bipartisan effort and used the freshest available census data. Finally, any significant variances were justified (if justification were needed) by the presence of some legitimate State interest.

In sum, the Ohio General Assembly did all that a state legislature *practicably* could be expected to do. Some judicial panels have recognized that the federal judiciary cannot insist that legislatures redistrict and then condemn them for balancing interests, making compromises, and doing the things which legislatures are designed to do. *Cf., Drum* v. *Scott*, 337 F. Supp. 588, 590 (M.D.N.C. 1976) (panel upheld North Carolina's Congressional plan as good-faith effort even though legislature had considered and rejected other plans with lower population variances, saying a good-faith effort does not require that the enacted plan be the most numerically equal of all possible plans. "If that were the test, there would be no room for legislative judgment and descretion; a computer would suffice."); *Cf. also, West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F.Supp. 395, 399 (S.D.W.Va. 1972) (evidence was overwhelming that good-faith effort was made to formulate and adopt a Congressional districting plan by the use of the latest federal census and by the use of methods and procedures "fairly designed to achieve numerical equality among the districts"). However, other panels – including the

one below – have not. *Cf., Doulin* v. *White*, 528 F.Supp. 1323, 1329 (E.D. Ark. 1982) (panel struck down Congressional districting plan because all avoidable deviations must be justified, and plan's deviations were found to be avoidable but not justified. "We have no doubt that the Arkansas General Assembly conducted itself in entire good faith, from motives honestly political, in the sense that it strove to reach a solution acceptable to most of the constituencies and interest groups involved, while still hewing fairly closely to the line of mathematical equality").

The problem which this Court should address (and over which District panels essentially have split) is this: Exactly what is required for a state legislature to constitutionally enact a plan which does not offend Article I, § 2? How are the two principles referenced above – that *absolute* population equality is not required and that redistricting belongs to the legislative domain – to be applied to the facts of a case such as this one?

Unless the Court resolves this issue now, there may be a substantial amount of litigation generated on the premise of the decision of the Court below. As stated earlier, that Court developed a "good-faith effort" standard which ignores all evidence of what a legislature *actually* did to reduce or eliminate population variances and focuses solely on the evidence of what the legislature hypothetically *might* have done *further* to reduce or eliminate population variances. Moreover, the Court effectively took judicial notice of the "fact" that the use of the smallest possible unit of census measurement always causes significantly reduced population variances in a districting plan – and without any apparent consideration of the absence of the same units throughout a state. And, the Court gave *no specific examples* of how particular census blocks could have been transferred between districts in the Ohio plan, thereby creating significant reductions in population variance.

The implications of this reasoning are imposing. Ohio is but one of many states which have not used the smallest possible units of census measurement in their Congressional districting plans. In those other states, as in Ohio, plaintiffs who have "lost" in the political process now have an authorization to attempt to "win" in federal court.

Indeed, based on the overall concept of the "good-faith effort" standard as interpreted and applied below, such plaintiffs need not limit themselves to challenging the unit of measurement used. They could suggest that if their legislature had taken more time, further reductions in the variances might have been achieved. They could suggest that if their legislature had used an expensive computer and entirely disregarded non-numerical factors, it might have generated several plans with *zero* population variance and simply enacted one of these. The variety of means for reducing variances which could be raised seems limitless; and the litigation appears endless.

CONCLUSION

This case affords an appropriate basis for this Court to explain exactly what *is* required of state legislatures engaged in the difficult job of Congressional redistricting. Factually, it is different from *Karcher* v. *Daggett* and every other Congressional redistricting case decided by this Court. In essence, it raises the problem of how to apply two well-established principles – namely, that Article I, § 2 does not mandate *absolute* population equality among Congressional districts, and that redistricting is a task constitutionally committed to the state legislative process.

The reasoning of the Court below breaks new ground and has far-reaching implications if it is adopted by other courts. In order to give the States needed guidance on future redistricting efforts – and obviate the substantial amount of litigation for which it could serve as a predicate – this Court should address the questions presented by this case now.

Therefore, it is respectfully requested that the Court set this case for plenary consideration, with briefs and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al., Plaintiffs v. Paul E. Gillmor, et al., Defendants	Case No. C-2-82-173
Gary M. Starr, et al., Plaintiffs v. James A. Rhodes, Governor, State of Ohio, et al., Defendants	Case No. C-2-82-394

ORDER

(Filed January 30, 1984)

In accordance with an opinion simultaneously filed herein and for the reasons therein stated, the Court concludes that plaintiffs have sustained their burden of proving that the Ohio Plan does not meet the "equal representation" standard of Article I, § 2 of the Constitution of the United States. A revised plan for Congressional redistricting which satisfies the requirement of Article I, § 2 should be forwarded to this Court

for review within forty-five (45) days of the date of this order.

BY ORDER OF THE COURT

/s/ NATHANIEL R. JONES,
Circuit Judge

/s/ JOSEPH P. KINNEARY,
District Judge

/s/ ROBERT M. DUNCAN,
District Judge

January 30, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al., Plaintiffs v. Paul E. Gillmor, et al., Defendants	Case No. C-2-82-173
Gary M. Starr, et al., Plaintiffs v. James A. Rhodes, Governor, State of Ohio, et al., Defendants	Case No. C-2-82-394

OPINION

(Filed January 4, 1984)

Before Nathaniel R. Jones, Judge, United States Court of Appeals for the Sixth Circuit; Joseph P. Kinneary, United States District Judge; and Robert M. Duncan, United States District Judge.

Duncan, District Judge. This is our second occasion to judicially review the State of Ohio's Congressional redistricting plan (Ohio Plan) which effectively became law on March 25, 1982.[1] By an order dated May 25, 1982, we decided not to

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[1] In 1981 a Congressional redistricting plan, House Bill 20, was introduced in the Ohio House of Representatives. After the House passed the bill on January 27, 1982, the Senate passed an amended

enjoin use of the plan for the upcoming Congressional election and stated that:

> We accordingly will hold in abeyance the issue of whether the Ohio plan satisfies the mathematical precision of *Kirkpatrick, supra* [*Kirkpatrick* v. *Preisler*, 394 U.S. 526, 533-34 (1969)] until we have the benefit of the Supreme Court's decision in the New Jersey case.

Flanagan v. *Gillmor*, 561 F. Supp. 36, 50 (S.D. Ohio, E.D. 1982).

On June 22, 1983, the Supreme Court of the United States decided the case *Karcher, Speaker, New Jersey Assembly, et al.* v. *Daggett, et al.*, — U.S. —, 51 U.S.L.W. 4953 (1983). The Supreme Court held unconstitutional a congressional reapportionment plan enacted by the New Jersey Legislature after the 1980 census.

After receiving certain additional 1980 census material, reading counsels' memoranda, hearing argument, and carefully considering the Ohio Plan in light of the precedential congressional redistricting requirements set forth in the *Karcher* case, we determine that the Ohio Plan fails to meet the "equal representation" standard of Article I, § 2 of the Constitution of the United States.

I

The facts of the case essentially remain unchanged from those set forth in *Flanagan, supra*. Rather than repeat them herein, a historical summary will do.

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version on February 17, 1982. At that time the legislature was facing a statutory time deadline of March 24, 1982, when petitions of candidacy for Congress had to be filed. A compromise was reached by a Conference Committee; the compromise bill was enacted and signed into law by the Governor on March 25, 1982. The enactment contained a provision postponing the petition-filing deadline until April 5, 1982. Subsequently, because of a number of errors in H.B. 20, a corrective measure, H.B. 953, was enacted and became effective April 5, 1982.

The Parties

Case No. C-2-82-173 was filed February 16, 1982, in this Court as a class action by named plaintiffs Patrick A. Flanagan and Ann Butler. They claimed that the Ohio General Assembly had failed to enact a congressional redistricting plan and requested the Court to establish a plan. Meanwhile the Ohio Plan was adopted. Those named plaintiffs now argue that the Ohio Plan is constitutional. (See Brief of Plaintiffs Patrick A. Flanagan and Ann Butler in Support of Present Ohio Congressional Redistricting Plan.)

Next, in March 1982, Juanita C. Brandon and Rose Marie Higenbottom moved to intervene in Case No. C-2-82-173 in a styled class action attacking the constitutionality of the plan. They vigorously continue the attack.

A number of Cuyahoga County residents were granted intervention as defendants. They support the lawfulness of the plan.

Gary W. Starr, Raymond J. Wohl, Frank D. Castelli, and John Kavlich filed an action in the United States District Court for the Northern District of Ohio seeking to have the plan declared unconstitutional (Case No. C-2-83-394). That complaint was amended and additional plaintiffs were added. A number of electors of the 21st Congressional District intervened as party defendants. The case was transferred to this District and consolidated with Case No. C-2-82-173. The *Starr* plaintiffs and defendants have not altered their positions concerning the constitutionality of the Ohio Plan.

The defendants in both cases are the current Governor and Secretary of the State of Ohio.

In the discussion hereinafter, plaintiff-intervenors in the *Flanagan* case and plaintiffs and plaintiff-intervenors in the *Starr* case will be referred to as plaintiffs. Defendants and defendant-intervenors in both cases will be called defendants.

The Ohio Plan

According to the 1980 census, the Ohio population is 10,797,630. The ideal population for each of Ohio's 21 Congressional districts is 514,193. All districts deviate from this ideal number. The average deviation from the ideal is .14%. Six districts have a percentage deviation of .20% or more; fifteen districts have a percentage deviation of .10% or more. District 1 has a population of 515,863, which is 1,694 above the ideal or +.33%. District 7 has a population of 512,706, 1,467 below the ideal or —.29%. The range of deviation between the two districts is .62%, referred to as the total percentage deviation.[2]

The General Assembly had other plans before it. None of them had a lower total percentage deviation, but two of them were better than the final plan regarding average percentage deviation. Earlier this Court concluded that "the plan as enacted compares favorably to the other proposed plans. *Flanagan, supra,* p. 42.

Deviations from the Ideal

At the time of the enactment of the Ohio Plan, the Ohio House of Representatives was controlled by a majority of Democrats, while the Senate was controlled by a majority

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[2] Certain factual similarities between the New Jersey case and the Ohio case are undeniable. In the New Jersey case, following the 1980 census, New Jersey lost one seat in the House of Representatives. After two unsuccessful attempts at redistricting, the legislature for the State of New Jersey convened and "swiftly" passed a bill introduced by Senator Feldman, president pro tem of the State Senate. Under the Feldman Plan, as the New Jersey plan came to be known, the average variance among districts was .1384% or about 726 people. Under the Ohio Plan, which was also drafted after the 1980 census, the average variance among districts was .14%. In the New Jersey Plan, the variation between the most and least populous districts was .6984% or 3,674 people. In the Ohio Plan, the population difference between the largest and smallest districts was 3,161, *i.e.*, a maximum variation of .62%

of Republicans. Obviously, a bipartisan accord was necessary to pass the legislation.

Senate Majority Leader Gillmor, Speaker of the House Riffe, and Representative Stinziano all testified, in essence, of their awareness of and sensitivity to a requirement that the districts be balanced in population and as close to the ideal number as possible.[3] However, Senator Meshel, Senate Minority Leader, testified that a plan could have been drawn "a lot more closely aligned in equal population." (Meshel Tr. 7-9.)

Edith Woodward, an employee of the Ohio Legislative Service Commission, worked on the preparation of the redistricting plan. She stated that her effort was to plan each district to have a population of 514,173 or as close to that figure as practicable. She was not told by any member of the General Assembly that there was any permissible fixed deviation. However, as we stated in our earlier opinion, Ms. Woodward admitted that with more time a better effort to achieve precise mathematical equality could have been made. *Flanagan, supra,* p. 42.

For the most part larger unit census tracts rather than smaller census blocks were used in preparation of the plan. Use of census blocks could have reduced the extent of a number of variances from the ideal.

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[3] For example, Senator Gillmor testified: (Gillmor Tr. 4)

> Q. Did you understand that the only variances from the mathematical equality of zero deviation are those that are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown?
>
> A. It was our feeling that we had to get down to zero if it were possible, yes.

However, Gillmor also stated: (Gillmor Tr. 4)

> Q. I take it then that your answer is yes, the necessity for legislative compromise did have an effect on efforts to achieve absolute equality among the districts. Is that correct?
>
> A. I suppose it may have.

The Ohio General Assembly's efforts to achieve mathematical parity were effected by a number of influences. The omnipresent reality of political compromise surely had a causal relationship to the result. The legislature, in enacting the plan, made efforts to "preserve the core of existing Congressional districts, to achieve relative geographical compactness, and to preserve the political complexion of the districts of incumbent members of the Congressional delegation." *Flanagan, supra*, p. 42. The Ohio Plan was also designed to maintain favorable district constituencies for Representative Louis Stokes, Ohio's only black member of Congress, and Representative Rose Oakar, the only woman member of Congress from Ohio.

In our earlier opinion we found that the legislature could have attained greater precision, and that the variances from the numerical ideal were not shown to be unavoidable. *Flanagan, supra*, p. 47.

Race-Religion

Plaintiff-intervenors contended that the Ohio Plan was purposely designed to dilute the voting strength of Ohio's black citizens. The evidence focused on the black populations in Franklin, Hamilton and Cuyahoga Counties. The May 25, 1982 opinion thoroughly discusses this issue. *Flanagan, supra*, pp. 42-46. In sum, we determined that the evidence fails to establish an invidiously discriminatory racial motive accounting in whole or in part for the districts' boundaries. We previously had occasion to note that if the General Assembly, in enacting a redistricting plan, uses racial demography as a factor in considering the political complexion of a district, and the result is a significant diminution of black voting power, we would be concerned about the lawfulness of such a plan. Under such circumstances a permissible inference of purposeful discrimination could be drawn. *See Flanagan, supra*, n.20.

Finally, we earlier decided that there were insufficient proofs that in dividing the 19th from the 21st District in part between

the two census tracts which together include University Heights, the General Assembly was animated by a purpose to dilute the ability of voters to organize along religious or racial lines. *Flanagan, supra*, p. 46.

II

As this Court noted in its prior opinion and as the Supreme Court noted in *Karcher*, Article I, § 2 establishes a high standard of "justice and common sense" for the apportionment of congressional districts: "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964) (footnote omitted). This principle of "equal representation" was defined with greater specificity in the seminal case of *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) when the Supreme Court was faced with a challenge to a Missouri redistricting plan.

In finding the deviations in *Kirkpatrick* unacceptable, the Supreme Court noted that

> [T]he "as nearly as practicable" standard requires that the state make a good faith effort to achieve precise mathematical equality . . . .
>
> Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small.

Kirkpatrick, supra, pp. 530-31.

Therefore, under the rule enunciated in *Kirkpatrick*, "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown . . . ." are permissible. *Id.* at 531.

Since the Supreme Court's decision in *Kirkpatrick*, the need to satisfy the mandate of Article I, § 2 for mathematical equality among districts has engendered additional litigation. Without engaging in an exhaustive analysis of all the precedents concerning reapportionment of congressional districts, the

Court notes that the most recent plurality decision of the Supreme Court in *Karcher* v. *Daggett* provides this Court with additional guidance on this question.[4] In *Karcher*, the Supreme Court set forth the analysis which must be engaged in by a court reviewing the constitutionality of a redistricting plan.

> First, the court must consider whether population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher, supra, p. —.

As is evident from the above-quoted language, *Karcher* mandates that courts engaged in a constitutional review of congressional redistricting plans employ a two-part analysis. First, the court must determine whether plaintiffs, opponents of

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[4] This Court has already indicated that there are a number of similarities between the Ohio and the New Jersey Plans. Despite these similarities, the proponents of the Ohio Plan argue that there are dissimilarities between the two cases that allow the Ohio Plan to withstand constitutional scrutiny. Specifically, defendants in this case argue that unlike the New Jersey case, where the legislature had a plan with lower deviations to choose from, the Ohio legislature in this case chose the plan with the lowest deviation. While it is true that the Supreme Court in *Karcher* mentions the fact that the New Jersey legislature had before it other plans with smaller deviations, that fact was one fact among many which led the court to conclude that the deviations were not unavoidable; it was not conclusive. Therefore, the fact that there were no other plans under consideration by the Ohio legislature which contained significantly lower deviations does not mean that the plan that was adopted contained deviations which were unavoidable.

the plan, have sustained their burden of proving population variances which could have been reduced or eliminated by a good faith effort. If, and only if, the plaintiff sustains this initial burden, must the Court move on to the second inquiry or level of analysis. At this stage, the state must bear the burden of proving that "each significant variance" was necessary to achieve some legitimate goal. *Id.* For the sake of clarity, the Court will attempt to elucidate what is required under each prong of *Karcher's* two-part analysis.

A. Good Faith

The first prong of the *Karcher* test requires this Court to make a determination as to whether "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher, supra, p.* —.

In determining what evidence satisfies this first prong of the *Karcher* analysis, this Court has struggled with the "good faith" language of *Karcher* and *Kirkpatrick*. The opponents of the Ohio Plan contend that plaintiffs meet their burden by showing that population variances among districts were not unavoidable and that the variances could have been reduced or eliminated altogether by a good faith effort. Conversely, proponents of the Ohio Plan argue that persons challenging the plan bear the burden of showing that the defendant acted without good faith or with some bad or invidious motive. This Court believes that the opponents of the plan have correctly analyzed *Kirkpatrick* and its progeny.

It is true that at first blush the standard for judging the constitutionality of redistricting plans under Article I, § 2 appears exacting, even harsh for those attempting to draft constitutionally sound redistricting plans. Nonetheless, it would seem that at least with respect to the first prong of the *Karcher-Kirkpatrick* test numerical considerations, *i.e.*, mathematical equality, are of primary significance.

The primary importance of mathematical considerations in

congressional redistricting[5] is apparent when one reads the line of cases concerning apportionment in state legislative districts. In explaining the distinction between apportionment of congressional as opposed to state legislative districts, the Supreme Court has had occasion to note that

> Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2, broader latitude has been afforded states under the equal protection clause in state legislative redistricting.

Mahan v. *Howell*, 410 U.S. 315, 322 (1973). *Accord Gaffney* v. *Cumming*, 412 U.S. 735 (1973).

In *White* v. *Weiser*, 412 U.S. 783, 792 (1973), the Supreme Court reaffirmed the distinction between challenges to congressional districts and challenges to state districts. Interestingly enough, the defendants in *Weiser* also argued that absent proof of invidiousness, population variances did not violate Article I, § 2. The court rejected this argument and "reiterated that the *Wesberry*, *Kirkpatrick* and *Wells* line of cases would continue to govern congressional reapportionments, although holding that the *rigor of the rule* of those cases was inappropriate for state reapportionments." *Weiser*, *supra*, p. 793.

This Court believes that support for the exacting definition of "good faith" may initially be found by contrasting the analysis used in those cases challenging state districts with the more stringent analysis used in cases involving congressional districts.

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[5] The primary significance of mathematical equality was apparent even before the Supreme Court decided *Karcher* as is evident by the discussion which follows. *See* pp. 11-13, *infra*. Moreover, this Court in its prior opinion acknowledged the primary importance of numerical considerations when it noted that under *Kirkpatrick* a finding that a variance is not unavoidable disposed of the issue of good faith. *See Flanagan*, *supra*, p. 17.

As has already been noted, the proponents of Ohio's plan seem to maintain that the numerical strictures of *Kirkpatrick* and *Karcher* can be avoided in this case because there is evidence that the legislature acted in subjective good faith. In support of their contention, proponents argue that a number of legislative leaders testified unequivocally that the plan in question was in their opinion a reasonable legislative compromise and that efforts were made to achieve population equality. More specifically, the proponents of the Ohio Plan, in support of their subjective good faith argument, contend that the New Jersey Plan, held to be unlawful by the Supreme Court in *Karcher*, is in some significant respects dissimilar to the Ohio Plan. There is no evidence that the Ohio General Assembly enacted the plan on the premise that a deviation lower than the statistical imprecision of the decennial census was the "functional equivalent of mathematical equality" as the District Court found in *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 982-983 (N.J. 1982).

Nothing in the Court's decision here today is meant to suggest that the Ohio legislature acted with invidious motives. The Court has no reason to doubt that the legislature conducted itself in good faith insofar as it strove to obtain an acceptable political solution to a thorny legal and political problem. Clearly, that solution was a compromise with which no one was completely enamoured but which dissatisfied the fewest number of people. However, the absence of evidence of the subjective bad intentions of individual legislators is irrelevant. Such evidence is not required to sustain the burden of proof set forth in the first prong of *Karcher*.

The Court concedes that were the question of "good faith" capable of resolution by use of a standard less exacting than that set forth in *Karcher* and *Kirkpatrick*, we would arguably have a closer case. However, this Court concludes, and is not alone in doing so, that good faith as that term is used in *Karcher* and *Kirkpatrick* is tantamount to a term of art having a special meaning. See *Doulin* v. *White*, 528 F. Supp. 1323,

1328-29 (E.D. Ark. 1982).[6] Stated rather simply, when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in the special sense in which *Karcher* and *Kirkpatrick* use that phrase.

In the case at bar, opponents of the Ohio Plan sagely note that this Court has already concluded that greater precision was possible than that which was achieved by the Ohio Plan. *Flanagan, supra,* p. 47. More specifically, this Court concluded that "the variances were not shown to be unavoidable." *Id.* The court went on to note that this failure to achieve mathematical equality could be attributed to a number of factors including the process of legislative compromise, the unit of measurement used,[7] and the hurried manner in which the plan was adopted. *Id.* at 42.

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[6] In *Doulin* the court similarly rejected attempts by proponents of Arkansas' redistricting plan to persuade the court that good faith means subjective good faith. This Court finds the reasoning of that court persuasive.

It is possible to argue, of course, that if the plaintiffs' burden is limited to showing "variances which can be reduced and which are not unavoidable" then the term "good faith" is rendered meaningless. This Court believes that the definition of good faith herein adopted is entirely consistent with the Supreme Court's opinion in *Karcher*. While the conclusion that the term good faith is in essence synonymous with proof that population variances could have been reduced and were not unavoidable may render the words "good faith" surplusage, this conclusion does not render the term "good faith" meaningless. Rather it results in a greater specificity of meaning for that term. In this regard it can no longer be the subject of dispute that "at some point . . ., population variances *do* import invidious devaluation of an individual's vote . . . ." *White* v. *Weiser,* 412 U.S. 783, 792 (1973). This language seems to buttress this Court's conclusion regarding the "good faith" language in the line of cases beginning with *Kirkpatrick* and ending with *Karcher*.

[7] This Court concluded in its original opinion that "census tracts are the larger unit of measurement and census blocks are the smaller. By utilizing census blocks, a greater degree of mathematical precision

This Court concluded in its prior opinion and today reaffirms the conclusion that had the legislature exercised the kind of good faith effort to achieve population equality required by the Supreme Court, it would have been able to come significantly closer to that goal than it did. While this Court has no doubt that the legislature was trying to do something in good faith, achieving population equality was not the sole focus of legislative efforts. More specifically, the difficulty arose in this case, as in many others, when the legislature tried to achieve population equality while concurrently pursuing secondary goals. Pursuit of secondary goals will often result in variances where such variances might otherwise not exist. That is precisely what appears to have happened in this case. Specifically, Witness Tilling testified as follows:

> Q. Would it have been possible to draw 21 congressional districts with exactly 514,173 people in each of them, using the data that you had available?
>
> A. Not without seriously disrupting the communities of interest which you have asked me about before. They would be decimated by such a process.
>
> Q. But it would have been possible by ignoring that? Is that your testimony?
>
> A. Basically, I guess I am saying that you can do one or the other.
>
> Q. Then it would also have been possible to draw a plan that varied by less than 3100 people among the districts, wouldn't it?
>
> A. Yes, again, if you are willing to disregard communities of interest and census tract boundaries, you could, indeed, do that.

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was possible." *Flanagan, supra,* p. 42. While it is true that the Court also concluded that "[t]he evidence at trial was inconclusive on the issue of whether greater precision could have been obtained solely by reallocation of census tracts . . ." *Id.*, at 42, n.5, the failure to make more frequent use of the smaller unit of measure was one factor which led to the Court's conclusion that the variances were not unavoidable.

(Tilling Tr. 127-128.) This testimony suggests that mathematical equality was sacrificed for the pursuit of secondary goals. While the Supreme Court has conceded that there may be permissible variances, such variances must be shown by the defendants to be the result of the pursuit of some legitimate goal or policy. Defendants have failed to make the requisite showing in this case. Moreover, this showing is irrelevant to whether the good faith standard of *Karcher* has been satisfied.

Before moving on to an analysis of the secondary goals proffered as basis or justification for population variances in this case, one final related matter deserves to be addressed. The proponents of the Ohio Plan argue that drafters of a redistricting plan may still be held to have acted in good faith even though they pursued secondary political goals. This argument is little more than a restatement of prior arguments. That is, the proponents appear to be arguing that the burden should not shift to them even though there are "not unavoidable variances" which resulted from the pursuit of legitimate secondary goals provided they are found to have acted in subjective good faith. This argument is rejected by this Court.

Moreover, the Court believes the defendants misconstrue the relevance of the pursuit of secondary non-numerical goals to the question of whether the plaintiffs have met their burden under the first "good faith" prong of the *Karcher* test. The pursuit of secondary non-numerical goals is irrelevant to the first prong "good faith" inquiry as that inquiry has been defined at length in the preceding pages. Generally, consideration of such goals only becomes relevant after the issue of good faith has been resolved and the burden has shifted to the state to justify "not unavoidable variances." The language of *Karcher* supports this conclusion.

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives . . . . Nevertheless the claim that political considerations require population differences

> among congressional districts belongs more properly to the second level of judicial inquiry in these cases . . . .

Karcher, supra, p. —.

In this same vein, in considering the legitimacy of the particular secondary goal of preserving political subdivisions, the *Karcher* court noted that "while perfectly permissible as a secondary goal, [pursuit of that political goal] is not a sufficient excuse for failing to achieve population equality without the specific showing described *infra* . . . ." *Karcher, supra*, p. —, n.5.

Therefore, while the pursuit of secondary objectives is certainly permissible after *Karcher*, the presence or absence of such goals does little to militate in favor of finding good faith where the Court has found variances which are not unavoidable. Secondary goals must remain secondary; the primary goal must be equality. The pursuit of legitimate goals may be proffered as justification for "not unavoidable variances," however. In that regard, proof of the pursuit of secondary non-numerical goals is more properly considered as part of the state's proof after the burden has shifted.

B. Legitimate Secondary Goals

Upon a determination that a state legislature did not formulate a congressional redistricting plan containing only those variances which were unavoidable despite a good faith effort to achieve population equality, the burden shifts to the state to justify each significant variance. The state must show that a specific deviation from the ideal is necessary in order to achieve a legitimate state policy goal and that the policy is applied consistently throughout the plan. This second level of inquiry requires a three-part analysis with respect to each district which significantly deviates from the ideal. The state must show (1) that a variation resulted from the legislature's attempt to carry out a legitimate state policy; (2) that the variation was necessary in order to effectuate the policy; and

(3) that the policy was applied consistently throughout the state.

There is language in *Karcher* to the effect that "the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher, supra,* p. —. The Court does not indicate what is meant by a "significant variance."

Karcher's recent language is somewhat different from the language previously used by the Supreme Court in *Kirkpatrick*. In *Kirkpatrick* the Supreme Court stated that "the state must justify each variance, no matter how small." *Kirkpatrick, supra,* pp. 530-31. *Karcher,* on the other hand, requires the state to bear the burden of justifying "each significant variance." *Karcher, supra,* at —.

After giving this matter careful consideration, we interpret the language of *Karcher* as follows: In determining whether a variance is significant, the court must consider the total plan, the range of the variances from the ideal, and the nature of the goal or goals of the legislature.

This Court's interpretation of significant, as that term is used in *Karcher,* is supported by the following language from that opinion:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the state's interest, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

Karcher, supra, p. —.

Given the arguable uncertainty surrounding the meaning of the term "significant variance," and in order to adhere to the true spirit of *Karcher,* the state would be well-advised to be prepared to set forth a basis for each variance.

The Supreme Court has acknowledged that a state may have any number of legitimate concerns which will serve

to justify small variances in a redistricting scheme. A state's interest in making districts compact, in respecting municipal boundaries, in preserving cores of prior districts and in avoiding contests between incumbent representatives, have been set forth in *Karcher* as legislative policies which, if applied consistently, and in a non-discriminatory manner, could justify population deviations. *Karcher, supra,* p. ——.[8]

1. Preserving Minority Voting Strength

Preservation of minority voting strength is another example of a permissible state policy which may justify variances from the ideal. A state's desire to preserve existing minority voting strength is the logical outgrowth of the prohibition against the dilution of that voting strength. The Court has held it constitutionally impermissible to draw congressional districts in a manner which purposely dilutes the voting strength of an identifiable minority. The decision to preserve existing minority voting strength has not been specifically ruled on in the context of a challenge based upon a failure to reach population equality.

In *Karcher,* however, the Supreme Court indicated that the legislative policy of preserving minority voting strength

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[8] The court in *Karcher* also noted that some of the policies presented by Missouri in *Kirkpatrick,* which are not presented in this case, could be legitimate justifications for variances. District-to-district differences in the number of eligible voters, or projected population shifts, may in some instances stand.

> We rejected [Missouri's] arguments not because those factors were impermissible considerations in the apportionment process, but rather because of the size of the resulting deviation and because Missouri '[a]t best made . . . haphazard adjustments to a scheme based on total population,' made 'no attempt' to account for the same factors in all districts and generally failed to document its findings thoroughly and apply them 'throughout the state in a systematic, not an ad hoc manner.'

Karcher, supra, p. —— (citations and footnote omitted.)

against the potential of dilution provides a legitimate justification for a population deviation, where a "causal relationship" exists between that policy and the deviation. The District Court, in that case, found no such "causal relationship between the goal of preserving minority voting strength . . . and the population variances." *Daggert* v. *Kimmelman*, 535 F. Supp. 978 (D. N.J. 1982). Observing that the record was "completely silent" on that relationship, the Supreme Court concluded that the District Court's findings were not "clearly erroneous." In so concluding, however, the Supreme Court suggested that the policy of preserving minority voting strength itself is a legitimate one. That policy therefore provides a legitimate justification for a deviation where the facts indicate that it is causally related to the deviation.

The legitimacy of the preservation of minority voting strength, moreover, has been addressed in connection with the congressional reapportionment of districts subject to the Voting Rights Act of 1965. In *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1976), the Court addressed the issue whether racial considerations could be intentionally used in an affirmative manner when reapportioning congressional districts. The Court held that racial criteria may be used in redistricting plans in order to maintain non-white voting strength. *Carey, supra*, at 165-168.

If a state may explicitly use racial criteria in drawing districts in a manner which will maintain the minority voting strength of a community, then, as *Karcher* indicates, it follows that the state may also draw districts in a manner which will preserve minority voting strength where it already exists.

While the state in this case did not attempt to justify the Ohio Plan by arguing the preservation of minority voting strength, the state did claim to justify certain variances on the grounds that it was creating "safe" districts for Ohio's only black Representative and Ohio's only woman Representative. The preservation of safe congressional districts

for Representatives Stokes and Oakar in the 21st and 20th districts, respectively, is not only an outgrowth of a policy seeking to preserve minority (protected class) voting strength, but also of an analogous policy of preserving minority representation. Having such representation is important to Ohio's delegation in the Congress. Therefore, the state's goal of preserving safe districts for Representatives Stokes and Oakar is permissible as a justification for necessary small deviations in district population.

Although such a goal is legitimate, the burden remains with the state to show with particularity that certain deviations in the plan were necessary to achieve that goal, and that that goal was applied in a consistent manner throughout the state. There is no evidence before the Court which states, other than in general and conclusory terms, that the only way the state could have achieved the goal in question was to have the variances that appear in this plan.

The Court hastens to add that if upon further consideration of this plan the General Assembly is persuaded, and the state can demonstrate to this Court, that small deviations in connection with this legitimate goal are necessary, then such deviations would certainly comport with the standards of *Karcher*.

2. Political Fairness

Defendants strongly urge upon this Court other justifications for the variances found in the Ohio Plan. Specifically, proponents of the plan argue that to some extent, the population variances were caused by a legislative intent to be politically fair. Generally speaking, it is hard to quarrel with the legitimacy of such a goal. Certainly insofar as this goal reflects a legislative intent to prevent gerrymandering, it is legitimate. *Karcher, supra*, p. — n.6. Before the Court may accept this goal as a legitimate justification for variances, however, the state must relate with particularity how each variance furthers such a goal, *i.e.*, the necessity requirement of *Karcher*. The state must further sustain the burden of

demonstrating consistent application of the concept of political fairness.

Once again, the record in this case reveals that the state has merely asserted in a general way that political fairness justified the variances present in the Ohio Plan. Stated another way, the state has failed to carry its burden under the second prong of the *Karcher* analysis.

3. Political Compromise

This Court is well aware that the Ohio Plan was enacted only after a political stalemate between the parties had been resolved by a dedicated conference committee. Apart from their contention that the Ohio Plan is politically fair, proponents of Ohio's plan appear to be arguing that in order to pass the Ohio Plan, political compromises or concessions from both political parties were necessary. Proponents seem to further argue that the variances in this case can be explained and justified under *Karcher* because the Ohio Plan was the result of such a compromise.

The Court concludes that the political compromise which occurred in this case was not a prospective goal but rather was a retrospective realization of what happened. While political fairness may be a legitimate goal under *Karcher*, *see* discussion *supra*, political compromise in an effort to achieve that goal is not a permissible consideration under either the first or the second prong of *Karcher*. There simply can be no such thing as a consistently applied policy of *ad hoc* political compromise.

4. Communities of Interest

The defendants seek to justify variances in Districts 11 and 19, and perhaps others, by stating that the legislature was concerned with preserving certain interests. We note that the court in *Kirkpatrick* specifically found that the attempt to "avoid fragmenting areas with distinct economic and social interests, thereby diluting the effective representation of those

interests in Congress" was an impermissible justification. *Kirkpatrick, supra,* p. 533.

The defendants have not even indicated to the Court what communities of interest they sought to preserve in Districts 11 and 19, much less what interests were being protected with respect to other districts. There has been no evidence presented that the deviations in any district's population was causally related to a policy of preservation of community interests. Even if defendants have strong state policy reasons to protect certain communities of interest, the defendants must still show that those policies could be effectuated only by permitting small variances and that, with respect to a certain type of interest, the policy was implemented and consistently applied throughout the state.

5. Other Legitimate Goals

The legitimate policy interests enumerated in *Karcher* include making districts compact, respecting municipal boundaries, preserving the areas of prior districts, and avoiding contests between incumbent Representatives. In discussing secondary goals in this opinion, we do not intend to imply that no other secondary goals are available to a state to justify small variances. Once again, however, it should be emphasized that if asserted, legitimate policy interests must be proved by the state in accordance with the standard set forth above.

To summarize, we find that the defendants have not sustained "the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher, supra,* p. ———.

III

The primary thrust of *Karcher* is the Supreme Court's insistence that the "equal representation" standard of Article I, § 2 requires that congressional districts be apportioned to achieve population equality as nearly as is practicable. We

have concluded that with a good faith effort the Ohio General Assembly practicably could have significantly reduced both the average variations from the ideal as well as the total percentage deviation. We reject a standard to determine primary good faith requiring a judicial attempt to hone in on the subjective mentality of a bicameral multi-member legislative authority. What the body did, rather than what certain of its leaders said that they were trying to do, is a far more appropriate and realistic inquiry in this matter. It is rather obvious, in this case, that well-intentioned but secondary considerations significantly account for the nature and extent of the variances.

In the first instance a state cannot account for deviations from the ideal district by factoring in well-meant secondary goal considerations, and then argue that plaintiffs have failed to show a lack of good faith in getting as close as practicable to the ideal number. If this were the case, a state would never shoulder the burden of justifying significant variances resulting from the implementation of secondary goals. *Karcher* holds otherwise. Stated another way, if variances were avoidable, implementation of secondary goals cannot make them unavoidable. Moreover, while the New Jersey secondary goals were arguably different from the Ohio goals, in New Jersey, as in this case, the state failed to bear the burden of proving that each significant variance between districts was necessary to achieve the legitimate goals. Additionally, in both the New Jersey and Ohio Plans the secondary goals, which otherwise may have had the promise of legitimacy, fell short of the mark for the reason that the state failed to show that the goal or policy was consistently implemented state-wide. Accordingly, this Court finds that the Ohio Plan, like the New Jersey Plan, fails to meet the standard of Article I, § 2 of the Constitution of the United States.

IV

This Court is firm in its appreciation of the fact that congressional redistricting is a duty of the Ohio General As-

sembly. Although *Karcher* is to a degree illuminating as to the requirements for constitutionality, redistricting remains a very difficult undertaking for the legislature. Important political considerations are at stake. Nevertheless, it is our expectation that the General Assembly can, with dispatch, present to this Court a revised plan, which comports with the Constitution of the United States. Nothing in this opinion is meant to suggest that the present plan is not amenable to revision or that it is not possible to satisfy the *Karcher* and *Kirkpatrick* requirements by eliminating variances between districts in the present Ohio Plan.

If, and only if, the General Assembly cannot meet its obligation, will this Court be required to provide a plan.

Accordingly, defendants are ORDERED to present the matter to the Ohio General Assembly for its consideration and preparation of a revised plan for congressional redistricting which satisfies the requirements of Article I, § 2 of the Constitution of the United States and other requirements of law. In the event that a plan is not forwarded to this Court for analysis and consideration within 45 days of the date of this order, further action will be taken by the Court.

Nothing in this opinion should be construed as prohibiting the General Assembly from extending the February 23 deadline for filing petitions of candidacy for Congress.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al., Plaintiffs v. Paul E. Gillmor, et al., Defendants	Case No. C-2-82-173
Gary M. Starr, et al., Plaintiffs v. James A. Rhodes, Governor, State of Ohio, et al., Defendants	Case No. C-2-82-394

ORDER

(Filed February 9, 1984)

Two minor errors in this Court's recent opinion in the above-captioned matters have been called to the Court's attention.

Initially, on page 4 of the opinion on the third line of the third paragraph, the number 514,193 should be 514,173.

Second, on page 2, the Court cites the *Karcher* opinion at 51 U.S.L.W. 4953. The correct citation is 51 U.S.L.W. 4853.

The opinion is hereby corrected to reflect the changes noted above.

So ORDERED.

/s/ ROBERT M. DUNCAN
Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al., Plaintiffs v. Paul E. Gillmor, et al., Defendants	Case No. C-2-82-173
Gary M. Starr, et al., Plaintiffs v. James A. Rhodes, Governor, State of Ohio, et al., Defendants	Case No. C-2-82-394

ORDER

(Filed February 13, 1984)

On February 10, 1984, this Court convened for purposes of hearing argument on a number of recently filed motions in this case.

From the bench, the Court denied the motion of the original plaintiffs for a stay pending resolution of their motion to amend this Court's January 30, 1984 order. The Court also denied the original plaintiffs' motion to amend the January

30, 1984 order and further denied the defendant Governor's motion for clarification and reconsideration of this Court's January 30, 1984 order.

Following the arguments of counsel, the Court has reconsidered its ruling on the defendant Governor's motion for clarification. More specifically, the Court understood counsel to argue at bar that there is some uncertainty concerning whether this Court's January 30, 1984 order operates to enjoin the State from conducting the 1984 primary and general elections using the 1982 Redistricting Plan.

This Court's order of January 30, 1984 specifically held that the

> plaintiffs have sustained their burden of proving that the Ohio Plan does not meet the "equal representation" standard of Article I, § 2 of the Constitution of the United States. A revised plan for Congressional redistricting which satisfies the requirement of Article I, § 2 should be forwarded to this Court for review within forty-five (45) days of the date of this order.

The Ohio Plan is unconstitutional and its use for the 1984 election is enjoined.

In this regard the motion of defendant Secretary of State for an order authorizing the conduct of the 1984 primary and general elections upon congressional districts enacted in 1982 is not well taken and is accordingly DENIED.

The only matter remaining for this Court's consideration is the defendant Governor's request for a stay. During argument, counsel for defendant Governor did refer to a stay pending appeal. More specifically, defendant Governor's motion reads as follows:

> Assuming this Court does not reconsider its decision and that, further, its Opinion and Order, dated January 30, 1984, does enjoin the holding of the 1984 Congressional elections from the present districts, this Defendant respectfully submits that such Order should be stayed to allow proper pursuit of an appeal of the decision.

We construe the foregoing as a motion for a stay. The Court does not believe that a motion for a stay pending appeal is properly before it at this time. The defendant's motion for a stay is therefore DENIED without prejudice.

So ORDERED.

/s/ NATHANIEL R. JONES
Circuit Judge

/s/ JOSEPH P. KINNEARY
District Judge

/s/ ROBERT M. DUNCAN
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK A. FLANAGAN, et al. GARY M. STARR, et al. ROBERT PAULSON, et al., Plaintiffs -vs- PAUL E. GILLMOR, et al. JAMES A. RHODES, et al., Defendants	Civil Nos. C-2-82-173 C-2-82-394 C-2-82-441 Judges Duncan, Jones and Kinneary

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DEFENDANT GOVERNOR RICHARD F. CELESTE'S NOTICE OF APPEAL

(Filed February 13, 1984)

Notice is hereby given that Defendant, Richard F. Celeste, Governor of Ohio, hereby appeals to the United States Supreme Court from the Opinion and Order entered in this

action on January 30, 1984. This appeal is taken under 28 U.S.C. §§ 1253 and 2284(a).

/s/ ROBERT B. McALISTER
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK A. FLANAGAN, et al. GARY M. STARR, et al. ROBERT PAULSON, et al., Plaintiffs -vs- PAUL E. GILLMOR, et al. JAMES A. RHODES, et al., Defendants	Civil Nos. C-2-82-173 C-2-82-394 C-2-82-441 Judges Jones, Kinneary and Duncan

MOTION OF DEFENDANT GOVERNOR RICHARD F. CELESTE FOR STAY PENDING APPEAL

(Filed February 13, 1984)

Defendant Governor Richard F. Celeste moves the Court for an Order staying its Order of January 30, 1984, pending this appeal of that earlier Order to the United States Supreme Court.

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MEMORANDUM

This Court entered an Opinion and Order on January 30, 1984, finding

> plaintiffs have sustained their burden of proving that the Ohio Plan does not meet the "equal representation" standard of Article I, § 2 of the Constitution of the United States. A revised plan for Congressional redistricting which satisfies the requirement of Article I, § 2 should be forwarded to this Court for review within forty-five (45) days of the date of this order.

Following that decision, several of the parties who had supported the constitutional validity of the "Ohio Plan" for Congressional districts filed Motions seeking amendment, clarification, reconsideration, and the stay of the January 30th Opinion and for an order allowing the 1984 primary and general elections to be conducted utilizing the Ohio Plan.

The Court conducted a hearing on those various Motions on February 10th. At the outset of that hearing, the Court denied the Motions to amend, for a stay pending resolution of that Motion, for clarification, and for reconsideration. After hearing arguments from counsel for the several parties, the Court, on this date, issued a further Order specifically noting – in response to counsel's argument during the hearing that it would assist in resolving a possible procedural issue due to the expression of uncertainty by some counsel as to the precise effect of the January 30th Opinion – that the 1984 Congressional elections were enjoined from being conducted under the Ohio Plan. That February 10th Order also denied the Motion for the Court to authorize the conduct of those elections under the Ohio Plan and denied – *without prejudice* – this Defendant's Motion for a stay pending appeal as not properly before it at that time.

At approximately the same time that the February 13th Order was issued, this Defendant – as counsel indicated during the February 10th hearing and in an earlier filing would be done – filed and served on all parties required to be served

a Notice of Appeal to the United States Supreme Court. That Appeal is being taken pursuant to 28 U.S.C. §§ 1253 and 2284(a).

This Defendant respectfully believes that the January 30th Order is appropriate for review by the Supreme Court. This Defendant also believes that the operation of that Order should be stayed pending completion of that final review. Supreme Court Rule 44 requires the initial application for this relief to be made to this Court – "except in the most extraordinary circumstances" – prior to it being presented to a Justice of the Supreme Court. Given the circumstances of this matter, this Defendant respectfully requests that a stay be granted by this Court.

As noted during the February 10th hearing, the Defendant Governor strongly supports the principle that not even a single person's constitutional rights should be subordinated to the non-constitutional claims of others. However, this Defendant believes that this matter presents circumstances of what could be called competing constitutional concerns. This Court has addressed those concerns extensively through several hearings and Orders. This Defendant believes that the circumstances presented here are of sufficient constitutional magnitude that a review by the Supreme Court is warranted.

During this Court's extensive examination of the Ohio Plan in response to the challenges of the Ohio Plan by numerous parties on various constitutional aspects of a Congressional districting provision, the Ohio Plan survived all of those attacks save for the single factor that the Ohio Plan did not achieve precise mathematical equality among the districts. While this Defendant in no way intends to suggest that there is any such thing as a "small" constitutional concern, it is felt that it is not unnoteworthy that, despite allegations to the contrary by the challengers to the Ohio Plan, there has been *no* finding of pervasive unconstitutionality of the Ohio Plan in the respects relevant to that examination.

As presented at the February 10th hearing, this Defendant apprehends a situation presently existing which is fraught

with several matters of "constitutional tension" – no least of which is that involving the separation of powers. The Ohio General Assembly presently has had presented to it the issue of the appropriate districts from which Ohio's Congressional delegation will be chosen in 1984. This Defendant has acknowledged that he will approve any Plan enacted by the General Assembly which he concludes meets the mandates of the United States Constitution.* While the most efficacious manner of attempting to achieve a constitutional Congressional districting plan appears to involve small movements of district lines in the present Ohio Plan to arrive at precise mathematical equality, this Defendant has no means to compel such action from the 132 members of the General Assembly. Under the principle of separation of powers, the task of delineating Congressional district boundaries is reserved to the Legislature by the United States Constitution – subject only to the approval by the Chief Executive of the State in signing any legislation and the examination by an Article III court for compliance with the mandates of the Constitution.

This Defendant has no assurance of whether a majority of each House of the Ohio General Assembly will choose to make "minor" boundary changes in the existing Ohio Plan or radical modifications of the districts or whether sufficient consensus can be arrived at on any change. Regardless of what changes are made, a review of all of the effects of those changes will have to be made by this Court. Of course, the more extensive the changes, the more extensive the review which will be entailed. And, a complete revision of the districts would require as extensive a review and consideration of various constitutional aspects of such a new plan as

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* At the same time, he also recognizes that any plan which serves to "carve up" the present districts of Congressional members Louis Stokes and Mary Rose Oakar is open to substantial constitutional question as diluting minority representation. And, that would be an extreme impediment to his approval of any plan which accomplished such an end.

has heretofore taken place regarding the current Ohio Plan. Until that review is completed – or other action is taken by the Court in the absence of action by the General Assembly – there will be uncertainty among potential candidates for several offices, in the election machinery itself, and among Ohio's voters. The configuration of the districts will determine where a candidate seeks signatures on a candidacy petition and in some cases whether a person will even be a candidate. Moreover, the pre-election filing, processing, and set-up steps of the election organization will be concommitantly delayed by the uncertainty. While it might be suggested that a commensurate delay of filing deadlines and election dates would remedy the situation, such a proposal, upon further examination, does not provide the ready answer it may appear to give. Whatever new plan would be placed in effect would be subject both to examination in this Court and potential review by the Supreme Court at the request of a person disagreeing with the result reached.

Most, if not all, of this uncertainty can be resolved by this Court granting the requested stay pending the appeal which has been taken by this Defendant. Having extensively and intensely reviewed the Ohio Plan in response to the numerous challenges made to that Plan, this Court is in the best position to promptly assess the impact of the relief presently requested. While recognizing that the Court has found that the present plan does not fully meet the requirements of the Constitution, it is also appropriate to note that this Plan also was *not* found constitutionally deficient in the numerous other aspects called into question by the challengers to that Plan. As a part of its examination, this Court also noted that the present Plan was bipartisan in nature, involved consideration of legitimate State interests, and was the product of legislative leaders acting with "subjective" good faith. Thus, it is *not* the result of an effort to disenfranchise or dilute the votes of persons of any particular political party, political persuasion, race, or religion. While the prior effort of the Legislature was found by this Court not to be fully consti-

tutional *only* because precise mathematical equality was not achieved under the circumstances presented to the Court, this Defendant does not believe that it can be asserted on any legitimately supportable basis that the present appeal is frivolous or somehow interposed for delay. Rather, it has been presented to obtain final review of an issue which exists in an area of the law which has been evolutionary and developmental. For all of these reasons, it is respectfully submitted that substantial equities support the granting of the requested relief. Any deferral to the consideration of this request by the Supreme Court will only continue the uncertainty which exists.

Existing decisions of the Supreme Court provide a basis for this Court to stay its January 30th Order – and effectively allow the 1984 primary and general elections to be conducted under the current Ohio Plan – even though the Court has found that Plan not fully constitutional as to the population equality aspect of the matter. In *Upham* v. *Seamon*, 456 U.S. 37 (1982), the Supreme Court remanded the case to the District Court to determine the appropriate remedy regarding the conduct of Congressional elections after noting

> It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. See, e.g., Bullock v. Weiser, 404 US 1065, 30 L Ed 2d 775, 92 S Ct 750 (1972); Whitcomb v. Chavis, 396 US 1055, 24 L Ed 757, 90 S Ct 748 (1970). Necessity has been the motivating factor in these situations.

456 U.S. at 44.

And, in *Wells* v. *Rockefeller*, 394 U.S. 542, 547 (1969), the Court stated that it was not error for a District Court to have allowed a primary election which was *three months* away proceed under a "plan despite its constitutional infirmities." Thus, in both prospective and retrospective exam-

inations of the issue, the Supreme Court has noted the absence of error in such an approach.

The "necessity" factor noted in *Upham* appears to reasonably comprehend the current Ohio situation of impending filing deadlines and a soon approaching election date. Moreover, the non-pervasive aspect of the Court-found constitutional infirmity suggested implicitly by *Upham* and *Wells*, and the cases cited therein, are also borne out in the subject situation.

Inasmuch as there is no assurance of the availability of a Congressional districting plan which has been finally approved by the United States Supreme Court as fully constitutional, an appropriate balancing of the equities – as accepted by Supreme Court precedent – would authorize a stay of this Court's January 30th Order pending consideration of the appeal by that Court. Therefore, Defendant Governor respectfully requests that his Motion for a Stay Pending Appeal be granted.

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al., Plaintiffs v. Paul E. Gillmor, et al., Defendants	Case No. C-2-82-173
Gary M. Starr, et al., Plaintiffs v. James A. Rhodes, Governor, State of Ohio, et al., Defendants	Case No. C-2-82-394

ORDER

(Filed February 17, 1984)

The original plaintiffs, the Governor and Secretary of State have moved for a stay pending appeal of this case to the United States Supreme Court. Previously, these defendants filed various motions seeking orders modifying, clarifying and staying this Court's order of January 30, 1980. Thereafter, the Court heard arguments which included the parties' positions concerning equitable interests at stake surrounding the

issue of a stay. By order dated February 13, 1984, the motions for a stay were denied without prejudice.

As of February 14, 1984, notices of appeal have been filed by the Governor, Secretary of State and the original plaintiffs. The motions for a stay pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure are now ripe for decision. The Court concludes that those motions are well taken.

This case presents serious and difficult legal questions. In addition, the Court notes that the Ohio General Assembly has established May 8, 1984 as the primary election day. Petitions of candidacy for Congress are required to be filed by February 23, 1984. The movants contend that it would be unrealistic to expect, and administratively impracticable for, the Ohio General Assembly to prepare and submit a redistricting plan for Court approval and to have that plan approved and in place so that Congressional candidates can be presented to the voters at the May 8, 1984 primary. *See Karcher* v. *Dagget* ,— U.S. —, 51 U.S.L.W. 4853 at 4855 (1983); *Upham* v. *Seamon*, 456 U.S. 37 (1982); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Kirkpatrick* v. *Preisler*, 390 U.S. 939 (1968); *Kilgarin* v. *Hill*, 386 U.S. 120 (1967); *Martin* v. *Bush*, 376 U.S. 222 (1964). This Court also notes that having a special primary election for congressional candidates or delaying the Ohio primary election would be financially burdensome and unduly unsettling to the citizens of Ohio.

It is well established that courts may stay their own orders when they have ruled on admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained. *See Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1972); *Parks* v. *"Mr. Ford"*, 386 F. Supp. 1251, 1270 (E.D. Pa. 1975); *Sweeny* v. *Bond*, 519 F. Supp. 124 (E.D. Mo. 1981). The balance of equities in this case tips in favor of maintaining the status quo until

such time as the United States Supreme Court has had an opportunity to review the merits of this Court's order of January 30, 1984. The motions to stay pending appeal are, therefore, GRANTED.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the Court's orders of January 30, 1984, as clarified on February 13, 1984, are hereby STAYED pending appeal to the United States Supreme Court.

/s/ NATHANIEL R. JONES,
Circuit Judge

/s/ JOSEPH P. KINNEARY,
District Judge

/s/ ROBERT M. DUNCAN,
District Judge

APPENDIX F

For the purpose of election of representatives to congress, the state is apportioned as follows:

First District: That portion of Hamilton county contained within the townships of Colerain, Crosby, Delhi, Green, Harrison, Miami, Springfield, and Whitewater and the municipal corporations of Arlington Heights, Cheviot, Elmwood Place, Forest Park, Glendale, Greenhills, Mount Healthy, North College Hill, Sharonville, Springdale, and Wyoming, and that portion of the municipal corporation of Cincinnati contained within census tracts 1, 2, 3.01, 3.02, 4, 8, 9, 14, 15, blocks 401, 402, 403, 404, and 405 of census tract 16, census tracts 23, 25, 26, 27, 28, 60, 61, 62.01, 62.02, 63, 64, blocks 101, 102 103 108 and 109 of census tract 65, census tracts 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82.01, 82.02, 83, 84, 85.01, 85.02, 86.01, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99.01, 99.02, 100.01, 100.02, 101, 102.01, 102.02, 103, 104, 105, 106, 107, 109 110, 111, 208.01, 209.01, 209.02, 212.02, 214.01, 218.01, 219, 220, 221.02, and 222 constitute the first district.

Second District. Brown county, Clermont county except for that portion contained within Wayne township, and that portion of Hamilton county not contained within the first district constitute the second district.

Third District. Montgomery county except for that portion contained within Washington township and except that portion of Miami township that does not contain the municipal corporations of Miamisburg and West Carrollton, or census tract of 503.01 constitutes the third district.

Fourth District. The counties of Allen, Auglaize, Crawford, Hancock, Hardin, Knox, Shelby, and Wyandot, and that portion of Richland county contained within the townships of Blooming Grove, Butler, Cass, Jackson, Jefferson, Mifflin, Monroe, Perry, Plymouth, Sandusky, Sharon, Springfield, Troy, Washington, and Worthington, census tracts 10 and 12 in

Madison township, and that portion of the municipal corporation of Mansfield contained within census tracts 1, 3, 4, 5, 6, 10, 11, 12, 13, 14, 21, and 23 constitute the fourth District.

Fifth District. The couties of Defiance, Erie, Henry, Ottawa, Paulding, Putnam, Sandusky, Seneca, and Williams, that portion of Fulton county not contained within the ninth district, that portion of Huron county contained within the townships of Lyme, Norwich, Richmond, and Sherman, and the municipal corporation of Bellevue, and that portion of Wood county not contained within the ninth district constitute the fifth district.

Sixth District: The counties of Adams, Clinton, Highland, Hocking, Jackson, Pike, Ross, Scioto, Vinton, and Warren, that portion of Athens county contained within the townships of Waterloo and York, that portion of Clermont county not contained within the second district, that portion of Fayette county not contained within the seventh district, and that portion of Montgomery county not contained within the third district constitute the sixth district.

Seventh District. The counties of Clark, Greene, Logan, Marion, Pickaway, and Union, that portion of Champaign county not contained within Jackson township, that portion of Fayette county contained within the townships of Jefferson, Madison, and Paint and enumeration districts 760, 765A, and 765B and block numbering area 9902 of Union township, and block numbering area 9902 of the municipal corporation of Washington Court House, and that portion of Madison county contained within the townships of Darby, Paint, Pleasant, Range, and Stokes constitute the seventh district.

Eighth District. The counties of Butler, Darke, Mercer, Miami, Preble, and Van Wert, and that portion of Champaign county contained within Jackson township constitute the eighth district.

Ninth District. Lucas county, that portion of Fulton county contained within the townships of Amboy, Chester-

field, Fulton, Swan Creek, Pike, Royalton, and York, and that portion of Wood county contained within the township of Lake and the municipal corporations of Northwood and Rossford constitute the ninth district.

Tenth District: The counties of Fairfield, Gallia, Lawrence, Meigs, Morgan, Muskingum, and Perry, that portion of Athens county not contained within the sixth district, that portion of Guernsey county contained within the townships of Adams, Knox, and Westland, that portion of Licking county contained within the townships of Bowling Green, Eden, Fallsbury, Franklin, Hanover, Hopewell, Licking, Madison, Mary Ann, Newark, and Perry, and the municipal corporations of Heath and Newark, and that portion of Washington county contained within the townships of Barlow, Belpre, Decatur, Dunham, Fairfield, Fearing, Marietta New, Muskingum, Palmer, Warren, Waterford, Watertown, and Wesley, and the municipal corporations of Belpre and Marietta constitute the tenth district.

Eleventh District: The counties of Ashtabula, Geauga, and Portage, Lake county except for that portion contained within the municipal corporations of Wickliffe and Willowick and that portion of the municipal corporation of Willoughby Hills contained within blocks 102, 104, 105, 107, 108, 109, 110, 111, 112, 908, 909, 910, 911, 912, 913, 914, 915, 916, 919, and 920 of census tract 2010, and that portion of Trumbull county contained within the townships of Bloomfield, Braceville, Bristol, Farmington, Johnston, Greene, Gustavus, Kinsman, Mecca, Mesopotamia, and Southington constitute the eleventh district.

Twelfth District. The counties of Delaware and Morrow, that portion of Franklin county contained within census tracts 3.10, 3.20, 3.30, 7.10, 7.20, 7.30, 8.10, 8.20, 9.10, 9.20, 14, 15, 23, 24, 25.10, 25.20, 26, 27.10, 27.20, 27.30, 27.40, 27.50, 27.60, 27.70, 27.80, 28, 29, 30, 31, 33, 34, 35, and 36, blocks 101, 102, 104, 105, 106, and 107 of census tract 37, census tracts 39, 40, 52, 57, 69.21, 69.23, 69.24, 69.31, 69.32, 69.33, 69.41,

69.42, 69.43, 69.44, 69.45, 69.90, 70.10, 70.20, 71.11, 71.12, 71.13, 71.20, 71.30, 71.91, 71.92, 72, 73.90, 74.10, 74.22, 74.23, 74.24, 74.25, 74.90, 75.11, 75.12, 75.20, 75.31, 75.32, 75.33, 75.34, 75.40, 75.50, 76, 77.10, 77.21, 77.22, 77.30, 77.40, 87.40, 89, 90, 91, 92.10, 92.20, 92.30, 92.40, 92.50, 93.11, 93.12, 93.21, 93.22, 93.23, 93.25, 93.26, 93 31, 93.32, 93.33, 93.34, 93.36, 93.37, 93.40, 93.50, 93.61, 93.62, 93.71, 93.72, 93.73, 93.74, 93.81, 93.82, 93.83, 93.84, 93.85, 93.86, and 93.90, and that portion of Licking county not contained within the tenth district constitute the twelfth district.

Thirteenth District. The counties of Ashland and Medina, that portion of Huron county not contained within the fifth district, that portion of Lorain county not contained within Columbia township, that portion of Richland county not contained within the fourth district, and that portion of Summit county contained within Copley township except for the municipal corporations of Akron and Fairlawn constitute the thirteenth district.

Fourteenth District. Summit county except for that portion contained within the thirteenth district constitutes the fourteenth district.

Fifteenth District. That portion of Franklin county not contained within the twelfth district, and that portion of Madison county not contained within the seventh district constitute the fifteenth district.

Sixteenth District. The counties of Holmes, Stark, and Wayne, and that portion of Carroll county contained within Brown township constitute the sixteenth district.

Seventeenth District. Mahoning county, that portion of Columbia county contained within the townships of Knox and West, and that portion of Trumbull county not contained within the eleventh district constitute the seventeenth district.

Eighteenth District. The counties of Belmont, Coshocton, Harrison, Jefferson, Monroe, Noble, and Tuscarawas, that

portion of Carroll county not contained within the sixteenth district, that portion of Columbiana county not contained within the townships of Knox and West, that portion of Guernsey county not contained within the tenth district, and that portion of Washington county not contained within the tenth district constitute the eighteenth district.

Nineteenth District. That portion of Cuyahoga county contained within the townships of Chagrin Falls and Olmsted, the municipal corporations of Bay Village, Beachwood, Bentleyville, Brecksville, Broadview Heights, Chagrin Falls, Fairview Park, Gates Mills, Glenwillow, Highland Heights, Hunting Valley, Independence, Lyndhurst, Mayfield, Mayfield Heights, Moreland Hills, North Olmsted, North Royalton, Oakwood, Parma Heights, Pepper Pike, Richmond Heights, Rocky River, Solon, South Euclid, Valley View, Walton Hills, and Westlake, the municipal corporation of Euclid except for that portion contained within census tracts 1526.01 and 1527, that portion of the municipal corporation of Lakewood contained within the census tracts 1601, 1602, 1603, 1604, 1605, 1607, 1608, 1609, 1610, and 1611, the municipal corporation of Parma except for that portion contained within census tracts 1771.01, 1771.02, 1772, 1773.01, 1773.02, and 1774.02, that portion of the municipal corporation of Strongsville contained within census tract 1862, and that portion of the municipal corporation of University Heights contained within census tract 1871.02, that portion of Lake county not contained within the eleventh district, and that portion of Lorain county contained within Columbia township constitute the nineteenth district.

Twentieth District. That portion of Cuyahoga county contained within the township of River Edge, the municipal corporations of Berea, Brooklyn, Brooklyn Heights, Brook Park, Cuyahoga Heights, Linndale, Maple Heights, Middleburg Heights, Newburgh Heights, Olmsted Falls, and Seven Hills, that portion of the municipal corporation of Cleveland contained within census tracts 1011, 1012, 1013, 1014,

1015, 1016, 1017, 1018, 1019, 1021, 1022, 1023, 1024, 1025, 1027, 1027, 1028, 1029, 1031, 1032, 1032.99, 1033, 1033.99, 1026, 1027, 1028, 1029, 1031, 1032, 1032.99, 1033, 1033.99, 1044, 1045, 1046, 1047, 1047.99, 1048, 1049, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1071, 1071.99, 1072, 1073, 1074, 1075, 1076, 1076.99, 1077, 1078, 1083, 1085, 1102, 1104, 1105, 1106, 1107, 1108, 1109, 1146, 1149, 1151, 1152, 1153, 1154, 1157, 1158, 1159, 1203, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1241, 1242, 1243, 1244, 1245, and 1246, the municipal corporation of Garfield Heights except that portion contained in census tracts 1543 and 1547, that portion of the municipal corporation of Lakewood not contained within the nineteenth district, that portion of the municipal corporation of Parma not contained within the nineteenth district, and that portion of the municipal corporation of Strongsville not contained within the nineteenth district constitutes the twentieth district.

Twenty-first District. That portion of Cuyahoga county contained within Warrensville township and the municipal corporations of Bedford, Bedford Heights, Bratenahl, Cleveland Heights, East Cleveland, North Randall, Orange, Shaker Heights, Warrensville Heights, and Woodmere, those portions of the municipal corporations of Cleveland and Garfield Heights not contained within the twentieth district, and that portion of the municipal corporations of Euclid and University Heights not contained within the nineteenth district constitutes the twenty-first district.

Any county, or part thereof, of the state which has not been described as included in one of the districts described in this section is included within that district which contains the least population according to the 1980 decennial census (as corrected by the bureau of the census through December 17, 1981) referred to in this section, and which is contiguous to such county, or part thereof. "Counties," "townships," "municipal corporations," "enumeration districts," "census tracts," and "census blocks" shall have the same meaning

and describe the same geographical boundaries as these terms mean and describe as used by the United States department of commerce, bureau of the census, in reporting the 1980 decennial census of Ohio; further, the official report, and all official documents relating thereto, of the aforementioned census are hereby incorporated by reference into this section. Unless otherwise specified a township includes all municipal corporations situated within the township.